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No. 99-1292

In The

Supreme Court of the United States

UNITED STATES BAKERY, INC., dba SNYDER'S BAKERY, INC., a foreign corporation,

Petitioner,

v.

JOHN SCHNEIDER, et al., individually and on behalf of the Class,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals Of The State Of Washington

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case is not "a challenge to the collective bargaining agreements" covering the plaintiffs' employment. (Petition, 5) It is a garden variety wage and hour case in which the defendant has raised the agreements as part of its affirmative defense. Plaintiffs believe that the issues are properly framed as follows:

1. Whether state law wage and hour claims brought by union-represented driver salesmen are pre-empted by the Labor Management Relations Act when their employer asserts that the workers are exempt "outside salesmen" and a state administrative regulation allows consideration of the "purpose" of their employment in weighing the exemption?

2. Must workers covered by a collective bargaining agreement containing a grievance and arbitration procedure attempt to exhaust that procedure prior to filing a state law wage and hour claim in state court where the agreement does not provide for overtime, and limits the arbitrator's jurisdiction to the four corners of the agreement?

LIST OF PARTIES

Petitioner:

United States Bakery, Inc., d/b/a Snyder's Bakery, Inc.

Respondents:

John Schneider
Kevin Crawford
Roy R. Clark
Mike Edgar
Lee Hendrickson
Mark C. Jordan
Ron Lamp
Terry Moore
Keith Nonemacher
Cal Paulus
Tom Stone
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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 4

A. No Authority Supports the Argument that a Collective Bargaining Agreement Pre-empts State Wage and Hour Laws 4

B. Plaintiffs are not Required to Submit Their Statutory Claims to Arbitration Under a Labor Contract; Arbitration Would be Pointless 7

C. The Court of Appeals' Evidentiary Rulings Do Not Merit Certiorari 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES CITED

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)..... 5

Atchison T. & S. F. R. Co. v. Buell, 480 U.S. 557 (1987)..... 6

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).....5, 7, 8, 9

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)..... 6

D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946)..... 10

Iowa Beef Packers v. Thompson, 405 U.S. 228 (1972)..... 8

Jefferson v. City of Tarrant, 522 U.S. 75 (1997)..... 1

Livadas v. Bradshaw, 512 U.S. 107 (1994)..... 10

Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944)..... 9

Vaca v. Sipes, 386 U.S. 171 (1967)..... 8

Wright v. Universal Maritime Service Corp., 525 U.S. (1998).....5, 7

STATE CASES CITED

Commodore v. University Mechanical Contractors, Inc., 120 Wash. 2d 120, 839 P.2d 314 (1992).....6, 7

Schneider v. Snyder's Foods, Inc., 95 Wash. App. 399, 976 P.2d 134, *review denied*, 139 Wash. 2d 1003, ___ P.2d ___ (1999)..... 4

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES CITED

28 U.S.C. § 1257(a) 1

29 U.S.C. § 185(a) 1, 3, 4

STATE STATUTES CITED

WASH. REV. CODE ANN. § 49.46.110 ..... 2, 5

WASH. REV. CODE ANN. § 49.46.120 2

WASH. REV. CODE ANN. § 49.46.130 5

OPINIONS BELOW

The Washington State Court of Appeals' decision is reported at 95 Wash. App. 399, 976 P.2d 134 and is reprinted in the Appendix, beginning at page B-1. The opinion of the Superior Court of the State of Washington for Yakima County is not reported and is reprinted in the Appendix, beginning at page A-1.

JURISDICTION

The Court of Appeals reversed the Superior Court's dismissal of plaintiffs' complaint, and remanded the case for further proceedings. Absent settlement, the case will be tried on the merits of plaintiffs' state-law wage and hour claims. Defendant maintains that plaintiffs are exempt "outside salesmen" under state law. If defendant prevails on this fact-bound defense, then plaintiffs' wage and hour claim will fail, for exemption is a complete defense to plaintiffs' lawsuit. If defendant loses at trial, it may again seek review here once the state-court litigation is concluded.

Under *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), the decision of the Court of Appeals is accordingly not a "final judgment" for purposes of 28 U.S.C. § 1257(a).

STATUTES INVOLVED

29 U.S.C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing

> employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

WASH. REV. CODE ANN. § 49.46.110:

> Nothing in this chapter shall be deemed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing in order to establish wages or other conditions of work in excess of the applicable minimum under the provisions of this chapter.

WASH. REV. CODE ANN. 49.46.120

> This chapter establishes a minimum standard for wages and working conditions of all employees in this state, unless exempted here from, and is in addition to and supplementary to any other federal, state, or local law or ordinance, or any rule or regulation issued thereunder. Any standards relating to wages, hours, or other working conditions established by any applicable federal, state, or local law or ordinance, or any rule or regulation issued thereunder, which are more favorable to employees than the minimum standards applicable under this chapter, or any rule or regulation issued hereunder, shall not be affected by this chapter and such other laws, or rules or regulations, shall be in full force and effect and may be enforced as provided by law.

STATEMENT OF THE CASE

Petitioner seeks review of an intermediate state appellate court's decision reversing the dismissal of plaintiffs' state law wage and hour claim, and remanding the case for further proceedings.

Plaintiffs deliver bread to retail sales outlets in eastern Washington. Defendant pays them no overtime wages regardless of the number of hours they work in a work week.

Plaintiffs are represented for collective bargaining purposes by separate local unions affiliated with the International Brotherhood of Teamsters, one based in Yakima and the other in Spokane, Washington. Neither collective bargaining agreement provides for the payment of overtime for work in excess of forty (40) hours in a work week. Both agreements are in fact silent as to overtime. Under the Yakima agreement, the union and defendant agreed that the plaintiffs "are exempt outside Driver-Sales employees." No similar language appears in the Spokane agreement.

Plaintiffs sued in Yakima County Superior Court seeking payment for their overtime wages under the state Minimum Wage Act, WASH. REV. CODE ANN. § 49.46 *et seq.* Plaintiffs sought certification as representatives of a class consisting of all bread delivery drivers employed by the defendant in Washington. Plaintiffs also sought injunctive relief under the Minimum Wage Act.

The trial court dismissed the complaint, holding plaintiffs' claims preempted by § 301 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 185.

(App. A-1) Defendant did not seek arbitration of the plaintiffs' claims under the collective bargaining agreements, nor did the trial court order it. (*Id.*)

The Washington State Court of Appeals, Division III, reversed, and remanded the case for further proceedings. *Schneider v. Snyder's Foods, Inc.*, 95 Wash. App. 399, 976 P.2d 134, *review denied*, 139 Wash. 2d 1003, ___ P.2d ___ (1999).

REASONS FOR DENYING THE WRIT

A. No Authority Supports the Argument that a Collective Bargaining Agreement Pre-empts State Wage and Hour Laws

There is no authority for defendant's argument that a collective bargaining agreement designating the plaintiffs as exempt from wage and hour statutes preempts state court jurisdiction under those statutes. The decision below is a plainly correct application of settled law reflected in numerous decisions of this Court.

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not allow employers and unions to exempt themselves from state regulations with which they disagree:

> Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it

> would be inconsistent with Congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985). Despite the preference for resolving labor disputes through arbitration, § 301 has been held not to pre-empt employee claims under the Fair Labor Standards Act, the federal counterpart to Washington's Minimum Wage Act. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981).[1] Rather, "different considerations apply" when an employee's claim "is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[2] *Id.*, 450 U.S. at 737.

Defendant argues that a state administrative regulation allowing consideration of the "purpose" of plaintiffs'

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[1] Defendant's suggestion that *Barrentine* supports the principle that a union-represented plaintiff may be required to exhaust arbitration before filing a wage and hour lawsuit (Petition, 8, n.5) is clearly wrong. Nothing in *Barrentine* even remotely supports this argument; rather, the Court refused to give preclusive effect to an unappealed arbitration award in the plaintiff's subsequent FLSA lawsuit. Further, at least in the absence of an express waiver in a collective bargaining agreement, a union-represented plaintiff in an age discrimination case need not arbitrate his claims before filing an Age Discrimination in Employment suit. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). There is no basis for applying a different rule to plaintiffs' wage and hour claim.

[2] The MWA provides that collective bargaining agreements may establish wages, hours and working conditions only "in excess of the applicable minimum" established by the statute, and allows employees to sue for overtime in Superior Court. WASH. REV. CODE ANN. § 49.46.110, .130.

employment in resolving defendant's "outside salesmen" defense requires pre-emption. This is so, the argument proceeds (without citation to authority), because review of the "purpose" of a job necessarily requires construction of a collective bargaining agreement setting the terms and conditions of the job. (Petition, 9-10).

If defendant is correct, these plaintiffs have recourse to no forum for resolution of their overtime claims. The trial court dismissed their state-law claim outright. (App. A-1) As discussed *in* Section 2, *infra*, plaintiffs cannot invoke arbitration of their statutory claims and, even if they could force arbitration under the collective bargaining agreement, it is by no means clear that the arbitrator would have jurisdiction over their statutory claims. Plaintiffs would not have access to normal discovery, and their claims for enhanced damages and attorney fees would likely not be available. *See, e.g. Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557 (1987).

The collective bargaining agreements covering plaintiffs are inadmissable, as discussed in Section 3, *infra*. If the agreements were admissible, and if it were necessary to interpret them, the Washington State Supreme Court has adopted a rule which accommodates the state's interest in enforcement of its wage and hour laws while protecting the federal interest in uniform interpretation of collective bargaining agreements. In *Commodore v. University Mechanical Contractors, Inc.*, 120 Wash. 2d 120, 839 P.2d 314 (1992) the Court held that employer defenses to state-law claims which implicated a collective bargaining agreement did not require dismissal of the complaint. Rather, the Court may adjudicate the defense under its concurrent § 301 jurisdiction. *See Charles Dowd Box Co. v.*

Courtney, 368 U.S. 502 (1962). The *Commodore* Court recognized that the law to be applied to the employer's contract defense was federal law. *Commodore*, 120 Wash. 2d at 131-32.

The state Supreme Court's approach is a sensible accommodation of both federal and state interests in such matters. The defendant's proposed solution – outright dismissal of union-represented employees' wage and hour claims – is manifestly unreasonable, and fails to weigh the state interest in uniform enforcement of its wage and hour laws.

B. Plaintiffs Are Not Required to Submit Their Statutory Claims to Arbitration Under a Labor Contract; Arbitration Would be Pointless

Defendant did not seek arbitration under the collective bargaining agreement in the trial court, nor did the trial court order it. (App. A-1) Arbitration of the plaintiffs' wage and hour claims would be futile where, as here, the unions controlling access to the process have agreed in writing that the plaintiffs are exempt. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) precludes defendant's argument that the arbitration clauses in the collective bargaining agreements covering plaintiffs' employment are, in themselves, an effective waiver of plaintiffs' right to resort initially to a state judicial forum for resolution of their wage and hour claims.

Ignoring for the moment that the trial court did not send the dispute to arbitration, it remains that the plaintiffs' unions have exclusive responsibility for processing disputes through the grievance and arbitration process. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728,

742 (1981); *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967). Yet as defendant here notes, the unions agree with defendant that the plaintiffs are exempt.[3] Thus, even if the defendant and the unions agreed to arbitrate the exemption issue, the hearing would be futile since the unions would acknowledge their agreement that the plaintiffs are exempt.

An arbitrator would lack jurisdiction to consider the statutory exemption under the collective bargaining agreements in any event. Arbitral jurisdiction under the Spokane collective bargaining agreement is limited to "the interpretation and construction of this Agreement." The collective bargaining agreement is silent on the subject of overtime. The arbiter thus is not only powerless to award statutory remedies to the plaintiffs (including liquidated damages, attorney fees and interest, all of which are available under state law) but is forbidden by the terms of the contract from considering the minimum wage act in evaluating the case. *See Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972) (Certiorari dismissed as improvidently granted in FLSA overtime case where collective bargaining agreement limited arbitral jurisdiction to grievances "pertaining to a violation of the agreement.")

Further, the Court has long recognized that labor arbitration is an unsuitable forum for statutory wage and hour claims. *Barrentine*, 450 U.S. at 437. Unions are concerned with collective rights, not necessarily individual ones, and may, without violating the duty of fair representation,

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[3] "The Teamsters spent much time evaluating the nature of [plaintiffs'] duties and their compensation before concluding that they were indeed 'outside salesmen.' " (Petition, 5).

"permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Id.* at 742.

Finally, while a labor arbitrator may be competent to resolve "preliminary factual questions, such as whether the employee 'punched in' when he said he did," there are no uniform standards for entry into that profession guaranteeing his competence to decide the "complex mixed questions of fact and law" involved in resolving a wage and hour claim. *Id.* at 743.

C. The Court of Appeals' Evidentiary Rulings Do Not Merit Certiorari

Defendant notes that the Court of Appeals' decision bars admission into evidence of the agreements covering plaintiffs' employment in support of its various defenses. (Petition, 16-17) This evidentiary ruling is unworthy of review.

The Court of Appeals' decision was correct in any event. This Court has long held that neither collective bargaining agreements nor " 'immemorial' custom" can undermine the FLSA. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602-603 (1944). Defendant acknowledges that the protections of the Washington Minimum Wage Act "cannot be bargained away." (Petition, 8) Given the Court's recognition in *Barrentine* that labor unions are not structured so as to champion individual rights under the FLSA, a collective bargaining agreement would seem an ureliable indicator of the "purpose" of a worker's job.

For the first time in this proceeding, Defendant raises the claim that the Court of Appeals' decision barring consideration of the collective bargaining agreements is itself pre-empted. A non-union bakery, the reasoning goes, would be free to submit its "employment agreements" into evidence in defense of a Minimum Wage Act claim by its employees. Barring admission of the collective bargaining agreements in this case thus "cripple[s]" the defendant because it "has the misfortune to be unionized." Defendant argues that this result is pre-empted by § 301 under *Livadas v. Bradshaw*, 512 U.S. 107 (1994).

This is a disingenuous construction of the opinion below. The Court of Appeals did not limit its decision to union-negotiated employment agreements. Any collective or individual employment agreement abrogating a Washington citizen's nonnegotiable rights under the Minimum Wage Act is, under the Court of Appeals' decision, irrelevant in an overtime lawsuit. An individual contract would be even less relevant than a collectively bargained one, given the disparity in bargaining power between an individual worker and his employer. *See, e.g. D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) (individual releases given in exchange for payment of FLSA-required wages do not bar later suit for liquidated damages allowed under the Act).

CONCLUSION

The Petition should be denied.

March 1, 2000

Respectfully submitted,

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APPENDIX A

THE HONORABLE MICHAEL W. LEAVITT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDON, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ, and ROBERT J. FILLION, individually and on behalf of the Class, Plaintiffs, v. SNYDER'S FOODS, INC., a Washington corporation, and UNITED STATES BAKERY, INC. dba SNYDER'S BAKERY, INC., a foreign corporation, Defendants.	Civil No. No. 96-2-02446-4 **ORDER AND JUDGMENT OF DISMISSAL**

This Court heard Defendant United States Bakery's Motion for Summary Judgment on January 9, 1998. The Court had reviewed all the brief and affidavits submitted by the parties, and heard argument of counsel. The Court finds that this case is preempted by the Sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Now therefore,

IT IS HEREBY ORDERED that Defendant United States Bakery's Motion for Summary Judgment is GRANTED, and this case is DISMISSED with prejudice.

DATED this ___ day of ___, 1998.

/s/ _____ Michael W. Leavitt
Superior Court Judge

Presented by:

TONKON TORP LLP

By /s/ _____
Peter H. Koehler, Jr., WSB No. 12708
Of Attorneys for Defendants

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APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

JOHN SCHNEIDER, KEVIN CRAWFORD, ROY R. CLARK, MIKE EDGAR, LEE HENDRICKSON, MARK C. JORDAN, RON LAMP, TERRY MOORE, KEITH NONNENMACHER, CAL PAULUS, TOM STONE, JOE WURTZ and ROBERT J. FILLION, individually and on behalf of the Class, Appellants, v. SNYDER'S FOODS, INC., a Washington Corporation, Defendant. UNITED STATES BAKERY, INC. d/b/a SNYDER'S BAKERY, INC., a foreign corporation, Respondent.	No. 17312-7-III Division III Panel One PUBLISHED OPINION* FILED MARCH 30, 1999

KATO, J. – Route drivers for Snyder's Bakery, Inc., appeal the summary judgment dismissal of their overtime wage claims. We reverse.

John Schneider and 12 other employees of United States Bakery d/b/a Snyder's Bakery, Inc., (Snyder's) filed a class action lawsuit against their employer for unpaid overtime compensation. All the employees are

route drivers who receive a commission on their individual sales plus a fixed salary. They are members of the Teamsters Union, which has a collective bargaining agreement with Snyder's that classifies route drivers as exempt salesmen. The complaint alleges that despite their working in excess of 40 hours a week, they have not received overtime as required by RCW 49.46.

Snyder's asserted these affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) statute of limitations, (3) preemption by the Labor Management Relations Act of 1947 (LMRA), and (4) failure to exhaust administrative remedies. Claiming the LMRA preempted the overtime claims, Snyder's moved for summary judgment. The court agreed and granted summary judgment dismissal. This appeal followed.

We review an order of summary judgment by engaging in the same inquiry as the trial court. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992). An order of summary judgment is appropriate when there is no genuine issue of material fact. CR 56(c); *Ervin v. Columbia Distrib., Inc.*, 84 Wn. App. 882, 886, 930 P.2d 947 (1997). The court must consider the facts in the light most favorable to the nonmoving party. Id. Summary judgment is appropriate only if, after considering all the evidence, reasonable persons could reach but one conclusion. *Commodore*, 120 Wn.2d at 123.

The route drivers contend they were entitled to overtime compensation pursuant to RCW 49.46, the Minimum Wage Act (MWA). Snyder's argues these claims were properly dismissed because they are preempted by the LMRA. Although federal law does not generally preempt

the MWA, section 301 of the LMRA, 29 U.S.C.A. SS 185 (West Supp. 1978), authorizes federal courts to resolve disputes involving collective bargaining agreements. Ervin, 84 Wn. App. at 888-89. Section 301 preempts the application of state law to interpret or enforce these bargaining agreements. *Commodore*, 120 Wn.2d at 126. Only those claims which are founded directly on rights created by a collective bargaining agreement and those substantially dependent upon construction of the agreement are governed by section 301. *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51, 925 P.2d 212 (1996), *review denied*, 133 Wn.2d 1021 (1997). Federal law does not preempt claims based upon state law when the law grants employees nonnegotiable substantive rights and when adjudication of those rights does not depend on the collective bargaining agreement. Id.

Rights established by state law are nonnegotiable when they cannot be waived, alienated, or altered by private agreement. Id. at 51. The MWA establishes a minimum standard for wages and working conditions for all employees. Id. (citing RCW 49.46.120). Under the MWA, employees have the right to overtime when they work more than 40 hours a week. RCW 49.46.130. In enacting these protections, the Legislature has stated that collective bargaining agreements may establish wages or other work conditions only in excess of the statutory minimums. RCW 49.46.110; *United Food & Commercial Workers*, 84 Wn. App. at 52. Accordingly, the rights provided by the MWA may not be waived by a collective bargaining agreement. *Ervin*, 84 Wn. App. at 891.

When a state law claim is independent or does not require interpretation of the collective bargaining agreement, section 301 does not preempt the claim. A state claim is independent of a collective bargaining agreement if it can be asserted without reliance on an employment contract. *Commodore,* 120 Wn.2d at 130-31; *Ervin,* 84 Wn. App. at 889.

This court in *Ervin* determined that claims under the MWA are not preempted by section 301. *Ervin,* 84 Wn. App. at 888. Mr. Ervin sought unpaid overtime from his employer. At the beginning of his employment, he was advised that his employer would not pay overtime wages. The union contract guaranteed him 40 hours' pay each week. Mr. Ervin did not work fewer than 8 hours in a day and began keeping track of the number of hours he worked. The collective bargaining agreement provided for time-and-a-half pay for hours worked in excess of 10 in a day or 40 in a week. Mr. Ervin quit his job and filed suit seeking overtime compensation.

On the employer's motion for summary judgment, the trial court dismissed the complaint. Id. at 886. On appeal, this court determined Mr. Ervin's claim was not preempted by section 301 because he could assert his claims without relying on the collective bargaining agreement. Id. at 890. The court stated that the rights provided by the MWA could not be waived or altered by a collective bargaining agreement and employees were not required to arbitrate these "nonnegotiable" claims. Id. at 891.

The general preference for arbitration was outweighed by the statutory requirements of the MWA and

the strong public policy against depriving union employees of statutory rights that would be available to nonunion employees. Id.

Here, like *Ervin*, the route drivers brought an action for unpaid overtime under the MWA. They can assert this claim without relying on the collective bargaining agreement. If the claims were preempted, they would be forced to arbitrate in violation of public policy since these union employees would be deprived of rights afforded to their nonunion counterparts. The court erred by granting summary judgment dismissal based on preemption.

Snyder's argues summary judgment was nonetheless appropriate because the court must interpret the collective bargaining agreement in order to determine if the route drivers are entitled to overtime. RCW 49.46.130 provides that, except for persons exempted under RCW 49.46.010(5) as outside salesmen, any employee who works more than 40 hours a week is entitled to overtime. Snyder's claims the route drivers are outside salesmen pursuant to RCW 49.46.010(5)(c) and are thus exempted from overtime. The statute defers to the rules of the director of labor and industries to define and delimit the term "outside salesman."

WAC 296-128-540 defines an outside salesman as any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

(b) In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or

(c) In demonstrating products or equipment for sale; or

(d) In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and

(2) Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

If the route drivers meet the definition of outside salesmen, they would not be entitled to overtime compensation. Snyder's claims the court cannot determine if they fall under this definition without interpreting the collective bargaining agreement. But the court need not interpret the collective bargaining agreement to make that determination. The court need only consider evidence as to their job duties. In any event, determining whether the

route drivers are indeed outside salesmen involves genuine issues of fact which cannot be resolved by summary judgment. *See Ervin*, 84 Wn. App. at 894-95.

Reversed.

SWEENEY and BROWN, JJ., concur.
Reconsideration denied May 4, 1999.